United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1044

To be argued
MELVIN D. KRAFT

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

LEON MAYER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT LEON MAYER

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BRIEF OF DEFENDANT-APPELLANT LEON MAYER

PRELIMINARY STATEMENT

The defendant-appellant Leon Mayer appeals from a judgment of the Southern District Court entered on January 17, 1977 convicting him after jury trial and verdict on thirteen counts of the indictment against him, namely counts 1, 5, 6, 7, 9, and 11 through 18, charging him with conspiracy to violate Sections 1001, 1341 and 1343 of Title 18 United States Code, Sections 77e, 77q, 77x, 78j and 78ff of Title 15, United States Code and 17 C.F.R.

230.256 and 230.10b and with substantive violations of Title 18, United States Code, Sections 1001, 1341, 1343 and Title 15, United States Code, Sections 77e, 77x. The defendant Mayer also appeals from written decisions and orders of the Honorable Charles H. Tenney, United States District Judge, entered on August 5, 1976, October 19, 1976 and November 11, 1976 denying pre-trial motions made on behalf of defendant-appellant.

THE STATUTES INVOLVED

Rule 5, Southern District of New York, Plan For Achieving Prompt Disposition of Criminal Cases

Rule 16(b), Federal Rules of Criminal Procedure

QUESTION PRESENTED

Was the government ready for trial within the six-month period imposed by Rule 5 of the Southern District Plan For Prompt Disposition of Criminal Cases?

STATEMENT OF THE FACTS

1. The Indictment

On April 11, 1975 an eighteen-count indictment [App.8]*

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* The abbreviation "App." followed by a number is a reference to a particular page or pages of defendant-appellant's separately bound appendix.

was filed in the Southern District charging defendant Leon Mayer and six other defendants with conspiracy to violate, and substantive violations of, federal wire fraud and mail fraud statutes, federal law prohibiting the making of a false report to the government and certain federal securities statutes and regulations in connection with the underwriting of an issue of unregistered securities of Minute Approved Credit Plan ["MACP"].

The main actors in the indictment, as drawn, were Joseph Lichtman, and Murray Lichtman, described in the indictment as the principal officers and directors of MACP who, in essence, are alleged to have acted with notorious and well-known convicted swindlers such as co-defendant Ezrine, and unindicted co-conspirators Sidney Stein and Michael Hellerman*, to bribe brokers, conceal the pay-offs from the public by not disclosing them in the prospectus and offering circular, cause false purchases of stock to be made, etc.

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* Ivan Alan Ezrine - See SEC v. Manor Nursing Centers, Inc., 458 F. 2d 1082 (2d Cir. 1972).

Sidney Stein - See United States v. Blauner, 337 F. Supp. 1383 (S.D.N.Y. 1971).

Michael Hellerman - See United States v. Koss, 506 F. 2d 1103 (2d Cir. 1974); United States v. Dioguardi, 492 F. 2d 70 (2d Cir. 1974).

Defendant Mayer was, at the time of the underwriting in 1971-1972 a registered representative employed by A.C. Kluger & Co., the underwriter. He was charged in the indictment with having accepted, together with Sidney Stein, a secret underwriting commission of $20,000 from the Lichtmans, which payment was not disclosed in the offering circular. He was also charged with having participated in a scheme to "sell" MACP shares to "dummy" purchasers without disclosing to the public that all shares of the underwriting had not been publicly placed. Defendant Mayer was arraigned on April 21, 1975 and pleaded not guilty.

2. The Course Of Pre-Trial Discovery And Motions

On April 21, 1975 Melvin D. Kraft, a member of the panel of Criminal Justice Act Attorneys in the Southern District was appointed as counsel for Mayer pursuant to the Criminal Justice Act. Shortly thereafter in early May, 1976 defendant Mayer's counsel telephoned Assistant United States Attorney Cullen W. MacDonald, then in charge of the case for the government, regarding pre-trial discovery. In that and ensuing telephone conversations Assistant MacDonald offered to provide a bill of particulars and all pre-trial discovery materials to which defendant Mayer was entitled without necessity of a formal motion. The substance of this offer was

confirmed by counsel for Mayer to Assistant MacDonald by letter [App. 68] which opened as follows:

> "Confirming our previous telephone conversation and the one we had this morning, you have indicated that the prosecution will supply to me, as defense counsel for Mr. Mayer, all the material to which Mr. Mayer is entitled without the necessity of formal motions."

The letter went on to enumerate certain specific items of particulars and discovery which counsel for Mayer had formulated from his preliminary review of the indictment, and embodied these items in a "preliminary schedule" enclosed with the letter. But counsel for Mayer cautioned that his listing was not "necessarily exhaustive".

In a letter by counsel for Mayer to the District Judge dated May 13, 1975 [App. 66] seeking an extension of the deadline for filing motions until May 30, 1975, a copy of which letter was sent to Mr. MacDonald, counsel for Mayer reiterated the above-mentioned statement by Mr. MacDonald that "all pre-trial discovery items and bill of particulars will be supplied by him voluntarily without the necessity of a motion... ."

After further extensions, defendant Mayer's counsel, on June 27, 1975 took the precautionary step of filing a motion for

a bill of particulars, discovery, and exculpatory materials, [App. 23] but, in reliance on the above mentioned outstanding offer of Assistant MacDonald, the motion was made without return date, and the Court was informed that the motion would be withdrawn if satisfactory provision for these matters would be made by the prosecutor [App. 73].

The discovery branch of defendant Mayer's June 29th, 1975 motion was brought pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure. While the only discovery materials specified in the motion were certain documents which were enumerated in a schedule annexed to the motion, the affidavit of counsel for Mayer expressly referred to counsel's May 5, 1975 letter above-mentioned [App. 26, ¶4] and stated counsel's expectation that he would receive what Mr. MacDonald had promised, i.e., all discovery material to which defendant Mayer was entitled:

> "Mr. MacDonald also stated that other unspecified Rule 16(b) material was available for inspection at his office."
>
> [App. 26, ¶5]

On August 27, 1975 a further meeting took place between Mayer's counsel and Assistant MacDonald. At that meeting Assistant

MacDonald raised objections to certain items sought by Mayer's motion for a bill of particulars. Counsel then moved to the subject of discovery.

The uncontradicted sworn account of Mayer's counsel as to that discussion reads as follows:

> In my above mentioned meeting with Mr. MacDonald on August 27, 1975, we reviewed the status of the discovery. I had at that time received the following categories of discovery materials from the prosecutor:
>
> 1. Mayer's grand jury and SEC testimony,
>
> 2. certain exhibits in the grand jury testimony, and
>
> 3. interview notes based on interviews with Mayer by the prosecutor and SEC staff.
>
> At our meeting on August 27, Mr. MacDonald stated to me that the only other discovery items to which I was entitled were the fifth, post-effective, amended notification of Minute Approved Credit Plan, and a statement of Mr. Joseph Lichtman, both of which he stated he would provide to me. Mr. MacDonald then stated that this comprised all of the discovery material which the prosecutor had in its files and to which I was entitled as counsel for Leon Mayer. [App. 53]

On August 29, 1975 Mayer's counsel wrote to the District Judge [App. 76] and Assistant MacDonald [App. 75] indicating his

decision, in reliance on Assistant MacDonald's representation that all discovery materials had been made available, plus two specific items which were to be made available, to press only that portion of Mayer's June 27th Motion seeking a bill of particulars and indicating his intention to submit that motion for the Court's consideration on September 19, 1975. On September 19, 1975 a memorandum of law in support of defendant Mayer's motion for a bill of particulars was filed with the Court and served on the United States Attorney [R. 31]*.

No response to this motion whatsoever was filed by the government. Sometime during September 1975, the government reassigned trial responsibility for this case from MacDonald to Assistant U.S. Attorney Bannigan [App. 39].

At that time Bannigan was functioning both in his capacity of Assistant U.S. Attorney and Chief of the Narcotics Office of the United States Attorney for the Southern District

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* The abbreviation "R" followed by a number is a reference to a document in the record on appeal by the number designation assigned to it in the index to the record on appeal, supplemented by page, paragraph or exhibit numbers where appropriate.

of New York. According to his own affidavit [App. 39] he was heavily and almost exclusively involved in preparation of an appellate brief in United States v. Jack L. Chestnut, Docket No. 75-1268 (2d Cir. March 8, 1976) [App. 40].

On October 10, one day before the expiration of the six-month period for readiness for trial under Rule 5 of the plan, Bannigan apparently made a hasty examination of the file and filed a one page piece of paper stating his readiness to go to trial [App. 34]. He also filed a bill of particulars [R. 19] in response to motions for bills of particulars by defendants J. Lichtman and A. Goral. However, in his last minute review of the file he overlooked defendant Mayer's pending motion for a bill of particulars as to which the District Judge was still awaiting a response from the government [App. 41].

There is no reason to believe from the Bannigan affidavit that he had interviewed any of the forty-five witnesses listed in the government's voir dire memorandum [submitted to the District Judge just prior to the trial in November 1976] in preparation for trial prior to October 10, 1975.

At the end of January 1976, the government again reassigned trial responsibility for this case from Bannigan to Assistant U.S. Attorney Timbers.

In February 1976, shortly after having been assigned the case, Assistant Timbers telephoned the District Judge's chambers inquiring as to a trial date for the case and was informed that the government had not responded to defendant Mayer's outstanding motion for particulars and that of another defendant, and that the Court would be prevented from setting a trial date until the government responded to these motions [App. 35]. Despite repeated prodding by the Court [R. 98, p. 30] Assistant Timbers did not respond to Mayer's outstanding motion until over two months later on May 11, 1976 when,only three days before a sua sponte hearing called by the District Judge on the question of the government's actual readiness for trial, the government filed an omnibus memorandum of law [R. 24]. The entire response of the government to defendant Mayer's motion for a bill of particulars consisted of the following two sentences:

> Defendants Lawrence Goral, Joseph Lichtman, Leon Mayer and Anthony Greco move for a bill particulars. The government has previously filed a bill of particulars dated October 9, 1975 and a memorandum of law in opposition to those demands not answered in its bill.
> [R. 24, p. 1]

In other words, the government now took the position that the bill of particulars furnished in October 1975, in response to the demands of defendants Greco and Joseph Lichtman, was a pro-

per and adequate response to Mayer's demand. Even the most superficial glance at the bill of particulars dated October 9, 1975 addressed to Greco and J. Lichtman [R. 19] reveals that it is substantially unresponsive to most of the items of Mayer's demand for particulars annexed to his June 27, 1975 motion [App. 31].

Subsequently on June 30, 1976 the government filed an additional omnibus memorandum of law [R. 34] in opposition to defendant Mayer's May 25, 1976 motion to dismiss his indictment, which elaborated its assertion that the bill of particulars filed on October 10, 1975 had provided particulars responsive to all items of defendant Mayer's demand which were proper requests for particulars [R. 34, p. 8]

In connection with the matter of discovery there was a meeting between Mayer's counsel and Assistant Timbers on March 8, 1976. Mayer's counsel was surprised to learn at that meeting that additional discovery documents were to be made available by the government for inspection by defendant's counsel, over and above the two still outstanding items. When subsequently received on May 14, 1976 these new documents were found to include many documents falling within the purview of Rule 16(b) which had not been disclosed to Mayer's counsel by either Assistant MacDonald

or Assistant Bannigan [App. 54]. A list of these documents, prepared by an associate of Mayer's counsel [App. 84] discloses that they included such material items as a July 17, 1972 letter from Michael Rich of A.C. Kluger & Co. to the SEC listing the names and addresses of all subscribers to the MACP stock offering including the so-called "dummy purchasers" who were witnesses at the trial [App. 85, item 25], the Fifth post-effective amended notification under Regulation A, Form 1A, which was the basis of Count 18 of the indictment, [App. 84, item 11] and stock transfer records for the MACP offering [App. 85, item 29].

On May 11, 1976 Assistant Timbers informed Mayer's counsel that still further documents to which Mayer was entitled by way of discovery would be forthcoming in the future when "prepared" by the prosecutor's office [App. 55]. This second disclosure, that still further documents existed that should have been disclosed in August, 1975, or earlier by Assistant MacDonald, led directly to making of the first motion by Mayer's counsel to dismiss the indictment referred to below.

On May 14, 1976 the District Judge, acting sua sponte, decided to conduct a hearing into the question of the government's actual readiness for trial on October 11, 1975. The Judge expressed

his reason for calling the hearing in the following terms:

> Well, I called this meeting because I have had some concern in connection with this case insofar as trial readiness on the part of the government and the fact that only within the last few days have motions of the defendants been answered, and although the government filed its notice of readiness some seven months ago, I don't know, but it doesn't seem to me that the government is ready when there are outstanding motions on the part of the defendants. It makes a mockery of the rules.
>
> [R. 98, p. 3]

At this hearing the government admitted that it had been informed by the Court of the existence of outstanding motions in January - February 1976 and that such motions had not been answered until a few days prior to the May 14th hearing [R. 98, pp. 8, 13, and 30].

In connection with this hearing the government submitted a May 7th, 1976 affidavit of Assistant MacDonald [R. 23] in support of the government's contention that it was ready for trial on October 11, 1975. Assistant MacDonald's affidavit [R. 23] recites that the government's investigation of the MACP offering began in August 1972, less than a month after the final overt act of the conspiracy and that the investigation continued for two years and

eight months thereafter. The investigation, which was carried on in conjunction with an investigation by the SEC of a series of securities frauds involving unindicted co-conspirator Michael Hellerman, is stated to have involved the interviewing of witnesses and the obtaining of "numerous documents" which finally "blossomed into numerous investigations and subsequently approximately 10 criminal trials." Commenting upon the affidavit of Assistant MacDonald the Court stated:

> I have read that and it shows that the government, so far as the government's case, was exhaustively prepared; they had been preparing it for a period of years. But it shows that the government had done little or nothing to fulfill its obligations to provide discovery for the defendants, and I don't consider that the government is ready for trial until it has performed all of its obligations with respect to timely motions.
> [R. 98, p. 9]

In the course of inquiry by the Court at the hearing on the subject of substantial discovery materials, the existence of which Assistant Timbers disclosed to defendant Mayer's counsel in their aforesaid meeting in March 1976, Assistant Timbers sought to explain such delayed discovery by the government as follows:

> Perhaps let me digress to answer Mr. Kraft's point about receiving more documents now than he received from Mr. MacDonald. Each assistant in our office has a different policy with regard to production of documents. I believe my policy is probably more liberal in production of documents than that of many other assistants and in fact --
>
> [R. 98, p. 20] (emphasis added)

This statement about Mr. Timbers' self-professed liberality, in the light of what subsequently transpired, in October 1976, as described below, is especially worth noting here. Criticizing this method of handling discovery matters the Court stated:

> I think you had better get a uniform policy or bring these matters before the Court and not do it by saying, "Come around to my office for tea and you can look over what we have got or what we choose to show you" and the Judge has no idea whether everything that they are entitled to has been produced or what has been produced or whether anything has been produced under this procedure.
>
> [R. 98, p. 21]
>
> Under the present procedure they [defendants' counsel] make a demand for all sorts of specific documents and you [the United States Attorney] just turn over the documents that you think are proper to turn over to them.
>
> * * * * *

> What is being done here is that the U.S. Attorney's office is usurping the function of the judge. And it is a very dangerous situation because, to be frank, I have gone to trial in criminal cases and have the lawyers tell me that they just got these documents two or three days before and being forced on to trial, and I am not going to be a party to that.*
>
> The same with particulars. Maybe it is particulars that are in dispute. The government makes the decision, furnishes the particulars and it doesn't furnish anything else.
>
> * * * * *
>
> Judges aren't looking for extra work, but they would like to have in their files answers to motions, responses to motions and not letters from the government informing the judge that the government has decided the motion.
>
> [R. 98, pp. 24-26] (emphasis added)

During the course of the May 14, 1976 hearing defendant Mayer's counsel indicated to the Court that a formal motion would be filed on behalf of defendant Mayer seeking dismissal of his indictment on the ground that the government had not actually been ready for trial on October 10, 1975 when it filed its statement of readiness. Subsequently, on May 25, 1976, defendant Mayer

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* Judge Tenney unwittingly adverted to the very situation that was later to arise before trial of this case.

filed a motion seeking inter alia dismissal of his indictment on the ground that the government by its failure to respond to defendant Mayer's motion for particulars and its failure to complete its discovery obligations had not been ready for trial within the period required by Rule 5 of the Southern District Plan for Prompt Disposition of Criminal Cases [App. 44].

On August 5, 1976 the District Judge filed an opinion denying Mayer's motion for a bill of particulars and denying Mayer's motion for dismissal under Rule 5 [App. 86]. The District Judge's decision denied Mayer's Rule 5 motion upon a finding that the discovery items withheld from Mayer by the government until the Spring of 1976, although in large part within the scope of Rule 16 (b) of the Federal Rules of Criminal Procedure [App. 96], had not been the subject of a request by defendant Mayer and their production was therefore not part of the government's trial readiness burden. As to the government's failure to provide a bill of particulars, the District Judge found that the government had satisfactorily dealt with Mayer's motion for particulars by mailing Mayer's counsel a copy of the bill of particulars and memorandum of law prepared in response to the motions of defendants J. Lichtman and A. Goral [App. 93, 94, 104].

In late August 1976 the government reassigned trial responsibility for this case from Assistant Timbers to Assistant Fryman, the fourth such assistant to hold responsibility for the case in seventeen months. On September 8, 1976, Mayer's counsel moved for reargument of that branch of Mayer's motion to dismiss grounded on Rule 5 [App. 114]. At a pretrial conference on September 13, 1976, a trial date was scheduled for November 8, 1976. On October 19, 1976 the District Judge entered a second decision affirming his previous denial of Mayer's Rule 5 motion [App. 138].

The District Judge's October 19th denial of defendant Mayer's Rule 5 motion [App. 138] elaborated further his earlier conclusion that the bill of particulars served on defendant Mayer on October 10, 1975 adequately responded to Mayer's motion, holding that the October 10, 1975 bill answered the substance of each item of Mayer's demand which was a proper request for particulars and left unanswered only those items which were not proper requests.

On October 18, 1976 only three weeks before the scheduled start of trial, Assistant Fryman wrote to defendant Mayer's counsel

enclosing photocopies of 90 pages of handwritten notes of interviews with Joseph Lichtman carried on by Messrs. Harris, Nortman, Lerner, Mandel and McQueenie of the SEC on September 6, 7, 11, 13, 20, 26, October 20, 30 and November 13, 1972.*

These documents, which Assistant MacDonald had promised to provide on August 27, 1975, and which Assistant Timbers had also promised to provide in the Government's Third Omnibus Memorandum dated June 23, 1976 [R. 34, p. 15], were crucial to the preparation of defendant Mayer's defense. The testimony of defendant Joseph Lichtman at the trial was the only direct first-hand evidence linking defendant Mayer with the scheme to sell MACP shares to dummy purchasers which was the heart of the government's case at trial. The delayed production of these documents, combined with the fact that: 1) they consisted of almost 100 pages of nearly illegible handwriting requiring hours to decipher; 2) that Joseph Lichtman decided, on the Friday afternoon before the

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* These interview memoranda are not themselves part of the record on appeal, however they are clearly a subject of the discovery agreement reached between Mayer's counsel and Assistant MacDonald [App. 53].

beginning of the trial on the following Monday, to appear at trial as a major government witness against Mayer; and 3) the massive additional discovery materials which were released just before trial, rendered these essential documents almost useless to Mayer's defense counsel in the short weekend that intervened between Lichtman's late Friday afternoon plea and the beginning of the trial on the following Monday morning.

On October 19, 1976 a third wave of discovery material, this one of tidal proportions, was unleashed by the government, this time by Assistant Fryman. In his letter of October 19, 1976 he announced the availability for inspection of an additional mass of previously undisclosed material consisting of 150 folders of documents which, on subsequent inspection, were found to fill almost six file drawers in his office. Assistant Fryman's October 19, 1976 letter making these documents available [App. 165] attempted to explain his belated, massive production of discoverable documents on the eve of trial in the following manner:

> We are making all of this material available now in order to avoid delays at trial from any possible claims that certain items should have been produced in advance of trial but were not.
> [App. 165-166] (emphasis added)

In addition to the mammoth listing of discovery materials then being made available to defense counsel, the October 19, 1976 letter of Assistant Fryman [App. 165] also contained a tentative list of documentary trial exhibits which consisted of more than 300 documents, almost all of which had never before been available to defense counsel. Counsel for Mayer and his law clerk proceeded to conduct an initial, hurried review of these documents on October 29, 30 and November 1, 1976, simply in order to select those documents of which copies would be needed. This initial review to screen the documents needed for copying required approximately sixteen hours [R. 45 ¶4].

Photocopies of these selected documents, totaling more than 2200 pages, were not made available to defendant Mayer's counsel until almost midnight on November 4, 1976, some eleven days prior to commencement of the trial [R. 45 ¶5].

A table compiled by counsel for Mayer in the course of organizing these documents for study and investigation which correlated descriptions of folders of documents and government exhibits made available by Mr. Fryman's October 19th letter with

persons referred to in defendant Mayer's Grand Jury testimony gives some indication of the direct materiality of the October 19, 1976 documentary production [App. 218]. That table shows the following:

Person referred to in Mayer Grand Jury Testimony	Documentation made available after October 19, 1976
J. Lichtman*	Folder 24, GX 21, 38, 39, 170, 177 194, 198, 200, 203
M. Lichtman*	Folder 25, GX 22, 36, 246
M. Adler	Folder 1(i)
R. Berengarten	Folder 15, GX 46
J. Caggiano	GX 28, 29
I. Ezrine	Folder 14, GX 1, 182
L. Glass*	Folder 15
L. Goral*	Folder 16, GX 120, 123, 163
A. Greco*	GX 114, 116, 117, 118, 119, 124, 164 171, 172
M. Hellerman	Folder 20, GX 178, 179, 180, 197
A. Kluger*	Folder 1(e)
D. Lipton	Folder 26, GX 54, 103
E. Meyer	Folder 29
J. Podell	Folder 5, GX 73, 79, 230, 291, 315

L. Rafalowicz*	Folder 39, GX 22, 61, 294, 325
B. Rich	Folder 41
M. Rich	GX 158, 160, 208-213, 215-238
S. Stein	GX 26, 28, 29

In response to this last minute avalanche of discovery material defendant Mayer's counsel, on November 3, 1976, by order to show cause, renewed Mayer's motion for dismissal of the indictment on the ground of the government's failure to complete its discovery obligations within the period required by Rule 5 [App. 144]. The burden imposed on defense counsel by this last minute massive disclosure of documents was described by Mayer's counsel at the November 11, 1976 pre-trial conference in the following terms:

> As I mentioned a moment ago, that this enormous amount of discovery material has just been made available. My office has been working on this, my entire office, we put aside our practice of law for our client, we almost neglected other responsibilities in order to grapple with this material.
>
> In reviewing it primarily, it appears to me there are at least a dozen people we should interview who are potential witnesses against Mr. Mayer.
> [R. 103, pp. 16-17]

The affidavit of defendant Mayer's counsel in support of this renewal motion stated:

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* These persons appeared at trial as witnesses for the prosecution.

> one fact clearly emerges; to wit, that there are many documents among [the documents made available by the October 19, 1976 letter] which are and have been in the possession of the prosecutor which are material to the defense of Mayer and that Mayer's requests to the prosecutors to make such materials available were reasonable. The mere fact that such materials have now been produced is the best evidence of the foregoing. [App. 151]

In the government's affidavit in opposition to Mayer's renewal motion, i.e., the November 8, 1976 affidavit of Assistant Fryman [R. 45], no issue whatsoever was taken with Mayer's assertion of the materiality and reasonable scope of the October 19, 1976 documentation.

On November 11, 1976, at a pre-trial conference the District Judge again denied Mayer's motion for dismissal of the indictment [R. 103, p. 2]. He indicated, in an endorsement on the motion papers, [App. 225], that his reason for so denying was that defendant Mayer had not specifically requested the production of the documents produced by the government under its October 19th letter and that the government therefore had no obligation to produce the documents within the six-month period imposed by Rule 5.

At the same pre-trial conference on November 11, 1976 the District Judge also denied the oral application of defendant

Mayer's counsel for a continuance of the trial to allow additional time for study and investigation of the October 19, 1976 voluminous discovery materials [R. 103, pp. 16-27]. The Judge then ordered that trial of defendants Mayer and Joseph and Murray Lichtman, the only remaining defendants who had not plead guilty, would commence on Monday morning November 15, 1976.

Late on Friday afternoon November 12, 1976, as mentioned above, defendants Joseph Lichtman and Murray Lichtman, [the principals of MACP, the issuer of the stock involved in the underwriting] withdrew their pleas of not guilty and each plead guilty to a single conspiracy count of the indictment. They were the last of the defendants to so plead with the result that the only defendant remaining to be tried was Leon Mayer.

3. The Trial

Trial of the case commenced on Monday, November 15, 1976. The highlights of the proof offered against Mayer were as follows: On the second day of trial the government presented the testimony of Leon Rafalowicz, an unindicted conspirator, who testified that he had acted as escrowee for $20,000 in cash alleged to have been intended for payment to defendant Mayer and unindicted co-conspir-

ator Sidney Stein. However, Sidney Stein did not appear at the trial. Moreover, witness Rafalowicz, who testified that he had given the $20,000 in cash to defendant Mayer, was unable, prior to a recess in his testimony, to identify defendant Mayer in the courtroom. He was unable to do so even though defendant Mayer was seated at the defense table when he was asked by the prosecutor to leave the witness stand and move about the courtroom in an attempt to identify the defendant [R. 96, pp. 105-106]. The only other direct testimony linking defendant Mayer with the alleged $20,000 cash payment was that of co-defendant Murray Lichtman who, as mentioned above, had withdrawn his plea of not guilty and become a government witness only two days before the commencement of trial. Murray Lichtman's testimony consisted of his completely oral recital that Mayer had received the cash; there was no corroborating witness (other than Rafalowicz) [R. 96, pp. 148-214].

In the other part of its case the government sought to establish the allegedly knowing participation of defendant Mayer in the scheme to "sell" shares of MACP to dummy purchasers. Here the only direct evidence of defendant Mayer's knowledge of, and

participation in, the scheme was the testimony of co-defendant Joseph Lichtman [R. 96, pp. 148-288], who, like his brother, Murray, had plead guilty and become a government witness two days before the commencement of trial. He, too glibly testified as to incriminating conversations and dealings with Mayer regarding dummy purchasers but here, too, no witness came forward to substantiate such conversations.

The remainder of the government's proof of this phase of its case consisted largely of documentary evidence concerning sales to the dummy purchasers and corroborative testimony, by persons whose names had been used as dummy purchasers, that they had never spoken to defendant Mayer, although records of sales to such purchasers had been made by him. Mayer testified, without contradiction on cross-examination, that the names of the dummy purchasers had been supplied to him, along with names of bona fide purchasers, by Joseph Lichtman. In this phase of the case the defense was severely hampered by both the very late production of the complicated, difficult-to-decipher Joseph Lichtman statements which were essential to an effective cross-examination of him, and by an insufficient opportunity to study, sift and investigate the

mass of documents disclosed by the government on October 19, 1976, many of which related to Joseph Lichtman's dealings and transactions.

Much of the documentary material first disclosed on October 19, 1976 proved to require prolonged study and became relevant in the course of the trial. As one example, there were large quantities of "New Account Forms" found in the folder identified as 1(i) on the list of documents contained in Mr. Fryman's October 19, 1976 letter [App. 165]. At the trial some of these forms were introduced in evidence as exhibits GX 189-207, to show that defendant Mayer committed irregularities in the opening of new accounts for the "dummy purchasers" [R. 96, p. 347-348]. Through use of other documents from folder 1(i) [Defense Exhibits E-O], defense counsel was able to demonstrate that Mayer's handling of the new account forms for the customers who subsequently proved to be "dummy" purchasers did not differ from his opening of accounts for his regular customers [R. 96, pp. 558-574, 712-714]. This is given merely as an example of the kind of discovery that was made available within days before the trial that should have been available over a full year earlier.

The entire matter of the delayed production of documents made the days before the trial and the trial an agonizing ordeal for Mayer and his counsel; agonizing in that so much came so late and could not be used effectively in Mayer's defense [R. 96, pp. 524-535]. On November 24, 1976 the jury returned a verdict of guilty on all thirteen counts of the indictment which had been submitted to them.

ARGUMENT

POINT I

THE CONVICTION OF DEFENDANT MAYER SHOULD BE REVERSED AND THE INDICTMENT AGAINST HIM DISMISSED BECAUSE THE GOVERNMENT WAS NOT READY FOR TRIAL WITHIN THE SIX MONTH PERIOD IMPOSED BY RULE 5 OF THE SOUTHERN DISTRICT PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES

This Court, in 1971, responding to the double burden placed on court dockets in this Circuit by an accelerating crime rate and the emergence of new procedures designed to make the criminal process more evenhanded, promulgated its Rules Regarding Prompt Disposition of Criminal Cases. Those Rules and their successors, the District Court Plans For Achieving Prompt Disposition of Criminal Cases, focused principally on the prosecutor's responsibility to bring his case to trial. The Rules and Plans sought:

> to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public

losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.

Hilbert v. Dooling, 476 F.2d 355, 357 (2d Cir. 1973)

The specific remedies designed to cure the foregoing maladies were Rule 4 of this Court's Rules Regarding Prompt Disposition of Criminal Cases and its successor, Rule 5 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases. Under these Rules the prosecutor was required to prepare his case for trial, and to be completely ready for trial within six months from the filing of the indictment. Such preparation and readiness, it is undisputed, includes performance of obligations and duties in respect to discovery and particulars to which defendants are entitled.

In this case, in which a trial did not occur until 20 months after indictment, the basic purpose of Rule 5 was soundly and completely defeated.

The handling of this case by the U.S. Attorney's office between April 1975 and November 1976 is pockmarked by precisely the sort of "creeping paralytic procedural delays" which the Rules and Plans were intended to banish. Prosecutorial neglect and inaction in this case prevented the trial judge from being in

a position to even consider scheduling trial until September 1976, some 18 months following filing of the indictment. Even then, unbeknown to the Court and the defendant, the government's discovery obligations remained largely unfulfilled. Such dilatory conduct, aggravated here by the shuffling of the case from one prosecutor to another (four in nineteen months), each with his own differing conception of the breadth of the government's discovery obligations, resulted in a post-indictment lapse of 20 months before trial. Mayer and his counsel, after being starved and frustrated for months in their continuing quest for full discovery and proper, complete particulars of these complex, multi-faceted charges, many of which were vaguely worded in the indictment, were suddenly inundated in early November with thousands of pages of discovery materials a few days before the trial. Too much came far too late. There was simply no reasonable opportunity for Mayer's counsel to read, study and digest these massive materials, to consult with Mayer concerning them, to investigate the many leads to defense evidence contained therein, to organize them for effective cross-examination, and to otherwise utilize them in Mayer's defense at the trial. Consequently, Mayer was deprived of his day in court. In that sense his conviction, although admittedly based on a sufficient quantum

of evidence, represents an horrendous miscarriage of justice. Mayer simply did not have a fair and full opportunity to contest the government's evidence.

The District Judge clearly erred in deciding below on August 5, 1976, October 19, 1976 and again on November 11, 1976 that the government had been ready for the trial of defendant Mayer on October 10, 1975. The government was not ready on that date. Nor was the government ready for months thereafter. Under the clear test of Rule 5 of the Southern District Plan for Prompt Disposition of Criminal Cases, this case should have been dismissed by the Court below.

The record, as will be shown below, reveals three fatal flaws in the government's allegation of readiness for trial on October 10th, 1975, namely: 1) the government was in default of its documentary discovery obligations to defendant Mayer; 2) the government was in default on defendant Mayer's September 1975 motion for a bill of particulars; and 3) the government's trial attorney was not prepared to try the case. Each of these defects in the government's trial preparation amounts to a violation of the letter and spirit of Rule 5 which requires dismissal of defendant Mayer's indictment.

1. The Government Failed to Comply With Its Discovery Obligations Within The Six-Month Period

By its October 10th, 1975 notice of readiness for trial the government represented to defendant Mayer's counsel and to the Court that it had fully performed its discovery obligations to defendant Mayer. In fact, as later events would conclusively prove, the government was then withholding great quantities of documents which were discoverable under Rule 16(b) of the Federal Rules of Criminal Procedure and which the government had agreed to provide voluntarily. The government's failure to fulfill its discovery obligations to Mayer within the six month period set by Rule 5 is an unquestionable violation of Rule 5 requiring the sanction of dismissal. Here, as in United States v. Blauner, 337 F. Supp. 1383, 1388 (S.D.N.Y. 1971) the government's extended failure to comply with its discovery obligations to defendant Mayer rendered the notice of readiness filed by Assistant Bannigan "a meaningless piec[e] of paper which manifest[s] nothing more than an illusory attempt to comply with" Rule 5 of the Southern District Plan.

In his August 5, 1976 decision denying defendant Mayer's motion for dismissal pursuant to Rule 5 as pointed out above, the District Judge found that the government, as of the October 1975 Rule 5 deadline, had not made available to defendant Mayer all documents in its possession coming within the scope of Rule 16(b) of the Federal Rules of Criminal Procedure. Having made this pivotal finding the Judge below then concluded that production of the discoverable documents disclosed to Mayer's counsel after the October 11, 1975 deadline, had not been requested. This same conclusion, i.e., that Mayer had not requested production of the documents in issue, was also the basis for the ruling of the Court below on November 11, 1976 denying Mayer's renewal motion.

In so concluding the Judge below erred. The record clearly and unambiguously demonstrates that counsel for Mayer persistently sought, and the government repeatedly agreed to provide, and represented that it was providing, all documents to which Mayer was entitled under Rule 16(b). The record is uncontradicted as to the fact that Assistant United States Attorney MacDonald represented: 1) continuously from May through August

1975 that he would voluntarily provide all discovery materials to which Mayer was entitled without the necessity of formal motion, and 2) that he further represented that all such discovery materials, with the two noted exceptions, had in fact been provided by him. Despite the continued availability of Assistant MacDonald to the government from May through November 1976 and the submission of an affidavit by him in defense of the government's readiness for trial at the May 14, 1976 hearing [R. 23] there is no denial, anywhere in the record of the defense motions to dismiss the indictment made in May, August and November 1976, by Assistant MacDonald that he made the aforesaid representations time and again.

Against these undisputed facts, the ruling below that the government had no obligation to make available to defendant Mayer, prior to October 10, 1975 all discoverable documents simply cannot stand. Since the Court below found as a fact, in its August 8, 1976 decision that many of the documents made available to Mayer's counsel for the first time in May 1976 were discoverable [App. 96], and, since no issue was taken with the materiality of the mass of discoverable documents made available in October 1976, it follows, as a matter of logic, that the government failed

in its obligation under Rule 5 to make substantial discoverable documents available to this defendant prior to October 10, 1975.

There is no requirement under Rule 5, or its predecessor, that prejudice be shown to have resulted from the government's unreadiness for trial, United States v. Gonzales, 389 F. Supp. 471, 475 (E.D.N.Y. 1975); United States v. Altro, 358 F. Supp. 1034, 1039 (E.D.N.Y. 1973). Yet in this case the prejudicial impact of the government's dragging of its heels for months in default of its discovery obligations was so overwhelming that the subject should not go unmentioned. We do not point to prejudice here in the strict legal sense of designating a particular document and arguing that lateness of its disclosure had a material, measurable, and adverse impact, in and of itself, on the verdict. We do, however, point to the frustration, despair and disillusionment of the defendant and his counsel in finding themselves inundated by a massive, documentary discovery in early November 1976, days before the trial, which had been knowingly withheld from the defense for over a year. Had there been compliance by the government with its obligation to be completely ready for trial when required by Rule 5, the defendant would never have been placed in

this hopeless situation and would have received the full-dress, fair trial to which he was entitled. The government's conduct in withholding these large quantities of documents until the eve of trial made the trial a feverish nightmare for defendant and his counsel. This was wholly unnecessary. It was also manifestly unfair and unjust. Its effect was to aggravate the burden of the 20 month delay. The peculiar facts and circumstances of this case cry out for application of Rule 5's sanction of dismissal.

2. The Government Failed To Respond To Mayer's Motion For A Bill Of Particulars Within The Six Month Period

On October 10th, 1975, when the government filed its notice of readiness and the six-month period of Rule 5 ran out, the government had failed to respond to a June 27th 1975 motion by defendant Mayer for a bill of particulars [App. 23]. The only explanation which has been offered for the government's admitted failure to respond to Mayer's motion within the six month period of Rule 5 is, as is pointed out above, that the Assistant United States Attorney in charge of the case overlooked the motion. However, the prosecutor's oversight cannot excuse the government's default in answering defendant Mayer's motion. Indeed the inadvertence of the prosecutor here only underscores the government's

general state of unpreparedness for trial when it filed its October 10, 1975 notice of readiness.

Despite repeated prodding by the Court, the government's failure to respond to Mayer's motion for particulars dragged on for seven months following the filing of its notice of readiness and actually prevented the Court from scheduling the trial of this case.

The record thus clearly demonstrates that: 1) the government, without valid excuse, had not responded to defendant Mayer's outstanding motion for a bill of particulars on October 11, 1975; 2) the government did not respond to that motion for months thereafter; and 3) that the trial judge considered this defect in the government's preparation so serious that he would not schedule a trial until it had been cured. These facts add up to a clear failure by the government to comply with Rule 5, in light of which separate deficiency the decision of the Court below cannot stand.

The District Judge's initial denial of defendant Mayer's Rule 5 motion was included in his August 5, 1976 decision in which he also denied defendant Mayer's motion for a bill of particulars. The denial of both motions, and the October 20, 1976 denial of

reargument were predicated on a finding that a bill of particulars served by the government on all defendants on October 10, 1976 in response to motions of defendants Greco and J. Lichtman, provided Mayer with all particulars to which he would have been entitled by his own demand for particulars.

While the Judge's reasoning presents a practical ground for denying the substantive relief sought by Mayer's motion for particulars, if supported by the record, which Mayer does not concede,* it provides no curative for the government's seven month procedural failure to respond to defendant Mayer's June 27th, 1975 motion for a bill of particulars which by the District Judge's own statement, [App. 35] had prevented him from reaching the motion and scheduling trial.

Even if one accepts the District Judge's conclusion that the government had, on October 10, 1975, satisfied the substance of Mayer's demand for particulars, it remains clear that the government's extended procedural default was a lack of readiness

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* In this connection, as pointed out in the facts, even the most superficial glance at the bill of particulars dated October 9, 1975 addressed to Greco and J. Lichtman [R. 19] reveals that it is substantially unresponsive to most of the items of Mayer's demand for particulars annexed to his notice of motion. [App. 31].

for trial chargeable to the government which effectively prevented the Court from reaching trial and frustrated the public's interest in prompt criminal trials. As this Court stated only months ago in United States v. Salzmann, Docket No. 76-1357 [2d Cir. decided September 28, 1976] with reference to the predecessor of the Southern District Plan, this Court's Rules Regarding Prompt Disposition of Criminal Cases:

> Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials... It is essential, therefore that the courts rise to the challenge by avoiding the sort of fatal delay "that undermines the law's deterrent effect by demonstrating that justice is not swift and certain but slow and faltering.
>
> In 1971 this Circuit responded to the challenge by promulgating Rules Regarding Prompt Disposition of Criminal Cases. (The "Second Circuit Rules"). Unlike the subsequent Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq., the Second Circuit Rules focused principally on the prosecutor's responsibility to bring his cases to trial.

U.S. v. Salzmann, supra, slip opinion at 37. What is important here is the "prosecutor's responsibility to bring his case to trial". If that responsibility was abandoned by the prosecutor and the public's interest in a prompt trial was

frustrated as a result, it cannot matter whether the delay resulted from a procedural rather than a substantive default by the prosecutor. The concern of Rule 5 is "not primarily to safeguard defendants' rights" but rather "to serve the public interest in the prompt adjudication of criminal cases." United States v. Flores, 501 F.2d 1356, 1360 (2d Cir. 1974). Here, where the slovenly handling of this case by the prosecution flew in the face of the public's interest in prompt trials and completely tied the hands of the District Judge from September 1975 until May 1976, it was wholly irrelevant for the prosecutor to assert as a defense to Mayer's Rule 5 motions that he complied with the substance of the defendant's motion. The government admittedly had not responded to Mayer's motion for particulars on October 11, 1975 when the Rule 5 period ran out; the government did not respond to that motion for the next seven months; and the government's failure to respond, by the District Judge's own words, prevented the bringing of this case to trial for the entire period of the government's default.

3. The Prosecutor Was Not Ready For Trial Within The Six-Month Period

The government was not ready for trial of this case on October 11, 1975 as required by Rule 5, for the further reason that the prosecutor who was then in charge of the case was not sufficiently familiar with the case to try it, and was not, in fact, actually ready to try it.

The familiarity of the prosecutor with the government's case is a factor to be weighed by the court in assessing the government's readiness for trial. Thus the court in United States v. Altro, 358 F. Supp. 1034 (E.D.N.Y. 1973), in finding the government to have been ready for trial under the then controlling Second Circuit Rules, stated:

> We credit the testimony of Assistant United States Attorney Robert L. Clarey, that his presentation to the Grand Jury was unusually complete, that he had done extensive investigation into this case prior to the presentation, and that within a few days or a week at the most of June 15, 1971, the government was ready to try the case.
>
> 358 F. Supp. at 1040. (emphasis added)

Here in stark contrast to Altro, the affidavit of Assistant United States Attorney Bannigan describes the extensive preparation of the case by Assistant MacDonald, but then goes on to confess his own extremely limited exposure to the case due to his preoccupation with other matters.

This case was a complicated, seven defendant, securities fraud case involving an eighteen count indictment. As Assistant Bannigan's own affidavit sets out, the government's file in this "newly-assigned" case included Grand Jury testimony by nine witnesses, interviews with Grand Jury witnesses, "documents that fill six file cabinet drawers" and material produced by a related SEC investigation involving 34 witnesses, 1664 transcript pages of sworn testimony and 70 exhibits.

There is no statement in the record by Assistant Bannigan that he had reviewed all, or even any part, of this voluminous material. Nor is there any allegation by Assistant Bannigan that he had personally interviewed a single witness in preparation for trial. Indeed the clear implication of Assistant Bannigan's affidavit is that he had done no more than hastily thumb through the file a few days before the expiration of Rule 5's deadline.

By no stretch of the imagination could Assistant Bannigan, under the circumstances outlined in his affidavit, have been sufficiently familiar with this mass of material to try the case on October 10, 1975.

The ultimate question posed by this branch of the appeal is whether the standard of trial readiness required of the prosecutor by Rule 5 in the Southern District is to realistically reflect the rigorous level of trial preparation demanded for practice in the federal courtrooms of this Circuit and District, or whether that standard is to be reduced to a mere "lick and a promise", satisfied by a nose count of witnesses and a "once-over-lightly" of the files on the night before the deadline expires. The clear intent of Rule 5 is that the prosecutor be in fact ready to go to trial by Southern District standards at the expiration of six months from the filing of the indictment. On this record, the prosecutor's clear failure to be ready in that sense requires reversal of the conviction below and dismissal of the indictment.

CONCLUSION

The judgment of conviction of defendant Mayer should be reversed and the indictment against him dismissed because the government was not ready for trial within the six month period required by Rule 5 of the Southern District Plan for Prompt Disposition of Criminal Cases.

Dated: New York, New York
March 24, 1977

Respectfully submitted,

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ADDENDUM

Rule 5. Southern District of New York, Plan For Achieving Prompt Disposition Of Criminal Cases (Effective September 29, 1975)

5. All Cases: Trial Readiness and Effect of Non-Compliance

In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 6, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Rule 16(b) Federal Rules of Criminal Procedure (As in effect until December 1, 1975)

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the

court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.